Supreme Court, U.S.
FILED
SEP 15 1999
OFFICE OF THE CLERK

No. 99-119

In the Supreme Court of the United States

BRONCO WINE COMPANY, PETITIONER

v.

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Acting Assistant Attorney General
MICHAEL JAY SINGER
JOHN S. KOPPEL
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

1622

QUESTION PRESENTED

Whether 19 U.S.C. 3512(c) precludes judicial review of petitioner's claim that 27 C.F.R. 4.39(i) is inconsistent with 15 U.S.C. 1052(a).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Abbott Labs. v. *Gardner*, 387 U.S. 136 (1967)	8
Association of Data Processing Serv. Org. v. *Camp*, 397 U.S. 150 (1970)	8
Block v. *Community Nutrition Inst.*, 467 U.S. 340 (1984)	8
United States v. *Fausto*, 484 U.S. 439 (1988)	8
Webster v. *Doe*, 486 U.S. 592 (1988)	11

Statutes, regulation and rules:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.*	6
5 U.S.C. 701(a)	11
5 U.S.C. 701(a)(1)	7
5 U.S.C. 702	8
5 U.S.C. 706(2)(B)	7
Federal Alcohol Administration Act, 27 U.S.C. 201 *et seq.*	2
27 U.S.C. 203(b)	2
27 U.S.C. 204	2
27 U.S.C. 205(e)	2
Lanham Act, 15 U.S.C. 1051 *et seq.*:	
15 U.S.C. 1052(a)	4, 5, 6
15 U.S.C. 1052(e)	6
North America Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057, 19 U.S.C. 3312(c)	12
Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, 108 Stat. 4809	3
§ 102(c), 108 Stat. 4818 (19 U.S.C. 3512(c))	6, 7, 11, 12

Statutes, regulation and rules—Continued: Page

§ 102(c)(1), 108 Stat. 4818 (19 U.S.C. 3512(c)(1)) 4, 8, 9, 11
§ 102(c)(1)(A), 108 Stat. 4818 (19 U.S.C. 3512(c)(1)(A)) 9, 10
§ 102(c)(1)(B), 108 Stat. 4818 (19 U.S.C. 3512(c)(1)(B)) 10, 11
26 U.S.C. 5311 5
27 C.F.R.:
Pt. 1:
Section 1.21 2
Pt. 4:
Section 4.23(a) 3
Section 4.25a(a) 3
Section 4.25a(e)(3)(ii) 3
Section 4.39(i) 3, 5, 7, 8, 9
Section 4.39(i)(2) 3
Section 4.39(i)(2)(i) 3
Section 4.39(i)(2)(ii) 3
Section 4.39(i)(2)(iii) 3
Section 4.39(i)(3) 2
Section 4.50 2
Pt. 9: 2
Section 9.133 4
9th Cir. R. 36.3 13
Sup. Ct. R.:
Rule 10(a) 13
Rule 10(c) 13

Miscellaneous:

43 Fed. Reg. 37,672 (1978) 2
51 Fed. Reg. 20,480 (1986) 3

In the Supreme Court of the United States

No. 99-119

BRONCO WINE COMPANY, PETITIONER

v.

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is unpublished, but the decision is noted at 168 F.3d 498 (Table). The opinion of the district court (Supp. Pet. App. 1-19) is reported at 997 F. Supp. 1318.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1999. The petition for rehearing was denied on April 13, 1999 (Pet. App. 5). The petition for a writ of certiorari was filed on July 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Alcohol Administration Act (FAAA), 27 U.S.C. 201 *et seq.*, makes it unlawful to ship, sell or deliver wine in interstate or foreign commerce unless such wine is labeled in conformity with Bureau of Alcohol, Tobacco and Firearms (ATF) regulations designed to prevent consumer deception. 27 U.S.C. 205(e). The statute further declares that no person may bottle or package wine unless he or she has obtained from ATF a "Certificate of Label Approval" (COLA), or has obtained a certificate of exemption after certifying that the bottled wine will be sold only in intrastate commerce. 27 U.S.C. 205(e); 27 C.F.R. 4.50.[1]

This case concerns ATF regulations regarding wine labels that use geographic names of "viticultural significance." See 27 C.F.R. 4.39(i)(3). Beginning in 1978, members of the American wine industry were granted the right to petition ATF to have select geographical areas designated as areas of viticultural significance or distinctiveness. The primary purpose of such a designation is to enable consumers to better identify the origin of the wines they purchase. See 43 Fed. Reg. 37,672 (1978). When such a viticultural area is approved by ATF pursuant to 27 C.F.R. Part 9, it may be used as an appellation of geographic origin on wine labels if "[n]ot less than 85 percent of the wine is

---

[1] All persons engaged in the business of producing, blending or bottling wine must do so pursuant to a "basic permit" issued by the Secretary of the Treasury, through his delegate, the Director of the Bureau of Alcohol, Tobacco and Firearms (ATF). 27 U.S.C. 203(b); 27 C.F.R. 1.21. Violation of the FAAA or its implementing regulations can be grounds for suspension or revocation of the basic permit. 27 U.S.C. 204.

derived from grapes grown within the boundaries of the viticultural area." 27 C.F.R. 4.25a(e)(3)(ii).[2]

ATF regulations also prohibit the use of false or misleading information on wine labels, including misleading geographic brand names. The brand name, usually the most prominent item on a wine label, conveys significant information to a consumer. See 51 Fed. Reg. 20,480 (1986). Accordingly, 27 C.F.R. 4.39(i) provides as follows:

> [A] brand name of viticultural significance may not be used unless the wine meets the appellation of origin requirements for the geographic area named.

Section 4.39(i)(2) also contains a "grandfathering" provision for COLAs issued prior to July 7, 1986.[3]

b. In 1994, Congress passed the Uruguay Round Agreements Act of 1994 (the Uruguay Round Act), Pub. L. No. 103-465, 108 Stat. 4809. Among other

---

[2] ATF regulations provide that a wine may be labeled with a varietal type designation (*e.g.*, cabernet sauvignon) only if it is also labeled with an appellation of origin of the grapes. 27 C.F.R. 4.23(a). In addition to approved viticultural areas, appellations of origin for American wines include the United States, a State, a county, or multi-state or multi-county appellations. 27 C.F.R. 4.25a(a).

[3] Under the grandfathering provision, a brand name of viticultural significance may be used if any one of three conditions is met: (1) the wine meets the 85% appellation of origin requirement, 27 C.F.R. 4.39(i)(2)(i); (2) the wine is labeled in such manner as to identify the actual county or viticultural area from which the wine is derived and the brand name uses a geographic area smaller than a State, 27 C.F.R. 4.39(i)(2)(ii); or (3) the wine is labeled with some other statement that ATF finds sufficient to dispel any potentially misleading impression of origin that might be created by the use of an area of viticultural significance in the brand name, 27 C.F.R. 4.39(i)(2)(iii).

things, the Uruguay Round Act amended the Lanham Act, 15 U.S.C. 1052(a), which governs federal registration of trademarks. As amended by the Uruguay Round Act, Section 1052(a) provides in relevant part:

> No trade-mark * * * shall be refused registration * * * unless it—(a) Consists of * * * a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after [January 1, 1996].

15 U.S.C. 1052(a) (quoted Supp. Pet. App. 8). The Uruguay Round Act, however, also limits the extent to which private citizens may invoke or rely on its provisions. In particular, Section 102(c)(1) of the Uruguay Round Act provides:

> No person other than the United States —
>
> (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or
>
> (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, * * * on the ground that such action or inaction is inconsistent with such agreement.

19 U.S.C. 3512(c)(1).

2. The "Rutherford" area of California's Napa Valley was designated by ATF as an area of viticultural significance in 1993. See 27 C.F.R. 9.133. Shortly thereafter, in 1994, petitioner Bronco Wine Company

purchased the "Rutherford Vineyards" brand name.[4] Supp. Pet. App. 2. That same year, ATF approved several COLAs for Rutherford Vineyards brand wine; those COLAs contained the appellation of origin "Napa Valley" in conjunction with the varietal designation. *Id.* at 2-3. Between 1995 and 1996, petitioner's bottlers submitted at least 11 new COLA applications that were approved by ATF, with a "California" appellation of origin in lieu of the earlier "Napa Valley" appellation. *Id.* at 3. At all relevant times, as a part of the brand name, the bottles contained reference to "Rutherford," a distinct viticultural area and appellation of origin. It is undisputed that the wine inside the bottle was not made from grapes grown in the Rutherford region of the Napa Valley and thus did not satisfy the requirements of 27 C.F.R. 4.39(i).

Accordingly, on October 7, 1996, ATF inspectors issued a 72-hour summary detention order, pursuant to 26 U.S.C. 5311, detaining approximately 32,000 cases of Rutherford Vineyards wine for failure to comply with the labeling requirements of 27 C.F.R. 4.39(i). Supp. Pet. App. 3. In accordance with the provisions of 26 U.S.C. 5311, the detention order was lifted at the end of 72 hours. Supp. Pet. App. 3.

Petitioner filed this civil action in the United States District Court for the Eastern District of California, seeking declaratory and injunctive relief and damages. Among other things, petitioner contended that ATF's regulations concerning the use of geographic brand names of viticultural significance, 27 C.F.R. 4.39(i), is inconsistent with the Lanham Act, 15 U.S.C. 1052(a), as

---

[4] Because petitioner does not have a pre-July 1986 COLA for the "Rutherford Vineyards" name, the grandfather clause of 27 C.F.R. 4.39(i) is not relevant here.

amended by the Uruguay Round Act. See Supp. Pet. App. 3-4. According to petitioner, ATF's regulations cannot prohibit the use of misdescriptive or misleading distinctive *viticultural area brand names* on wine *labels* because Section 1052(a) permits geographically misdescriptive names to be registered as *trademarks* where the name was used before January 1, 1996. Petitioner contends that ATF should have amended its regulations concerning brand names and areas of viticultural significance to correspond to the amendment to the trademark law mandated by the Uruguay Round Agreement that Congress implemented in the Uruguay Round Act.

The district court rejected petitioner's claim. Section 1052(a), the district court noted, was added to the Lanham Act as part of the Uruguay Round Act. Supp. Pet. App. 9. Section 102(c) of that Act, 19 U.S.C. 3512(c), specifies that the Act does not create a right of action or defense against the United States, or otherwise permit challenges to the actions or inaction of United States agencies or departments. *Ibid.* "[T]he portion of the Lanham Act upon which [petitioner] relies does not provide a private cause of action against an agency of the United States." Supp. Pet. App. 9. To the contrary, "[t]he purpose of this provision was to ensure that U.S. trademark law complied with particular provisions of the Agreement on Trade Related Aspects of Intellectual Property under the Uruguay Round," and it "[l]eft untouched * * * existing provisions of the U.S. law on geographic names, such as 15 U.S.C. § 1052(e) and the FAAA." Supp. Pet. App. 9.

The court rejected petitioner's reliance on the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, for the cause of action. Although the APA ordinarily permits individuals adversely affected by agency action

to challenge that action where there is no other adequate means of review, the court held that "the provision of the Uruguay Round Agreements Act which strips private plaintiffs of a cause of action trumps the Administrative Procedure Act's grant of a cause of action." Supp. Pet. App. 10. Accordingly, the court declined to reach the merits of petitioner's Lanham Act claim. *Ibid.*[5]

4. The court of appeals affirmed in an unpublished memorandum disposition. Pet. App. 1-4. Invoking 19 U.S.C. 3512(c), the court of appeals held that "there is no private right of action afforded Bronco for the Lanham Act claims it asserts in this litigation." Pet. App. 2. The court further stated that "[l]ikewise, the [APA] cannot be grounds for a Lanham Act claim because the APA specifically excludes review when a statute precludes judicial review." *Id.* at 2-3 (citing 5 U.S.C. 701(a)(1)).

ARGUMENT

Petitioner contends that the Uruguay Round Amendments Act of 1994 does not preclude it from challenging the Bureau of Alcohol, Tobacco and Firearm's regula-

---

[5] The district court also rejected petitioner's claims that ATF's regulation deprives it of the use of its trade name without due process and that the three individually-named ATF officials violated petitioner's due process rights. See Supp. Pet. App. 13- 18. The court of appeals affirmed, Pet. App. 3-4, and petitioner does not raise any of those claims before this Court. The district court declined to dismiss petitioner's claim that ATF's geographical brand name regulation, 27 C.F.R. 4.39(i), is arbitrary and capricious under the APA, 5 U.S.C. 706(2)(B). Instead of pursuing that claim, however, petitioner filed a notice of voluntary dismissal of the action and appealed the district court's dismissal of its other claims. Accordingly, petitioner's arbitrary and capricious claim is not before this Court either.

tions concerning the use of areas of viticultural significance as brand names on wine labels, 27 C.F.R. 4.39(i), as inconsistent with the Uruguay Round Amendments to the Lanham Act. In particular, petitioner claims that the Administrative Procedure Act (APA), 5 U.S.C. 702, provides it with a cause of action notwithstanding Section 102(c)(1) of the Uruguay Round Act, 19 U.S.C. 3512(c)(1).

1. a. Petitioner concedes, as it must, that the APA does not provide a cause of action for judicial review "if [another] statute" by its terms "precludes it." Pet. 9. Relying on *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), however, petitioner argues (Pet. 9-10) that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." 387 U.S. at 141.

As this Court has explained, it has never applied that clear and convincing standard "in the strict evidentiary sense," but rather "has found the standard met, and the presumption favoring judicial review overcome, whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 350-351 (1984) (quoting *Association of Data Processing Serv. Organizations* v. *Camp*, 397 U.S. 150, 157 (1970)); accord, *United States* v. *Fausto*, 484 U.S. 439, 452 (1988). Indeed, the presumption favoring judicial review can be "overcome by inferences of intent drawn from the statutory scheme as a whole." *Community Nutrition Institute*, 467 U.S. at 349; *Fausto*, 484 U.S. at 452.

Here, the courts below found that that presumption was overcome by the clear text of 19 U.S.C. 3512(c)(1), which states in pertinent part:

> No person other than the United States—
>
> (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or
>
> (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, * * * on the ground that such action or inaction is inconsistent with such agreement.

As the courts below both held, it is precisely such a forbidden challenge that petitioner is attempting to make here—*i.e.*, petitioner seeks to utilize that portion of the Lanham Act enacted as part of the Uruguay Rounds Act to challenge ATF's "inaction" in not amending its regulations pertaining to wine labeling and brand names that misleadingly incorporate an area of viticultural significance, 27 C.F.R. 4.39(i).

Petitioner's attempt to distinguish 19 U.S.C. 3512(c)(1) is not persuasive. Petitioner concedes that Section 3512(c)(1)(A) expressly bars "private rights of action" to enforce the Uruguay Round Agreements. But that barrier to suit, petitioner contends, does not apply to suits for judicial review under the APA, since the absence of a "private right of action under the statute challenged" does not preclude the same action from being brought under the APA. Pet. 10-11. Petitioner, however, ignores half of Section 3512(c)(1)(A)'s text. Section 3512(c)(1)(A) does not merely prohibit the recognition of causes of action or defenses "under" the Uruguay Round Agreements. Instead, it also declares that no individual "shall have *any* cause of action or

defense * * * *by virtue of* congressional approval of" the Uruguay Round Agreements (emphasis added). Manifestly, petitioner's cause of action—its very claim—arises solely because of (*i.e.*, by virtue of) congressional approval of the Uruguay Round Agreements. Indeed, absent Congress's approval of those Agreements in the Uruguay Round Act, the Lanham Act provision on which petitioner relies would not exist and petitioner would have no claim at all.[6] Because petitioner's claims arise "by virtue of" Congress's approval of the Uruguay Round Agreements in the Uruguay Round Act, those claims are barred by Section 3512(c)(1)(A).

Petitioner's suit is likewise precluded by Section 3512(c)(1)(B), which bars any suit, "under any provision of law," challenging agency "action or inaction" as inconsistent with the Uruguay Round Agreements. Seeking to evade the preclusive effect of Section 3512(c)(1)(B), petitioner argues (Pet 11-14) that it is not challenging ATF's actions as inconsistent with the Uruguay Round *Agreements*. Rather, petitioner insists, it is challenging ATF's action as inconsistent *with legislation implementing* the Uruguay Round Agreements. Whatever the merits of distinguishing between the Uruguay Round Agreements and the legislation implementing those agreements in the context of Section 3512(c)(1)(B), the distinction cannot help petitioner escape the scope of Section 3512(c)(1)(A), which bars causes of action "by virtue of" Congress's "approval" of the Uruguay Round Agreement, *i.e.*, by virtue of the

---

[6] Only petitioner's claim specifically based on the amended Lanham Act provision is before this Court. Petitioner voluntarily dismissed its claim that ATF's regulation is arbitrary and expricious under the APA (see note 5, *supra*).

Uruguay Round Act. Moreover, even with respect to Section 3512(c)(1)(B), "the provision of the Uruguay Round Agreements Act which strips private plaintiffs of a cause of action trumps the Administrative Procedure Act's grant of a cause of action." Supp. Pet. App. 10. See also 5 U.S.C. 701(a) (APA applies "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law"); *Webster* v. *Doe*, 486 U.S. 592, 599-601 (1988) (CIA director's decision to terminate an employee is not subject to APA challenge on statutory grounds). Petitioner cannot use the APA as a mechanism for bypassing the review-precluding provision Congress established in Section 3512(c)(1). As the district court explained, Section 3512(c) bars private actions relating to the implementation of the Uruguay Round Agreements on the theory that ensuring proper implementation of those agreements—because they are *agreements between governments*—should be the sole responsibility of the United States government and not of private persons through judicial processes.

b. Even apart from the preclusion-of-review provisions, petitioner cannot prevail because its substantive claim lacks merit. Petitioner claims that ATF regulations, which bar it from using an area of viticultural significance as its brand name on wine labels if the grapes used in making the wine do not come from that area, conflicts with the Lanham Act, which permits geographically misdescriptive brand names to be registered as trademarks. See pp. 5-6, *supra*. But the fact that geographically misdescriptive brand names used before January 1, 1996 are eligible for trademark registration as a general matter does not mean that ATF's prohibition on the use of a particular sort of brand name—those referencing areas of viticultural

significance and that thus are especially likely to confuse—in the specific context of wine bottle labels is invalid.[7] To the contrary, the questions of which categories of brand names are eligible for registration under the Lanham Act for various uses, and when brand names of viticultural significance can be used on wine labels in accordance with ATF regulations, are separate issues. As the district court summarized:

> The [Uruguay Round Act amendment to the Lanham Act] addresses the circumstances under which trademarks may or may not be registered with the Office of Patents and Trademarks [but] does not impliedly override otherwise valid federal laws and regulations. Indeed, 19 U.S.C. § 3512(a)(2) makes this point abundantly clear—it specifically provides that the Agreements and the associated enabling legislation shall not be "construed . . . to amend or modify any law of the United States."

Supp. Pet. App. 10.

2. Petitioner, in any event, nowhere argues that the unpublished decision of the court of appeals creates a conflict in circuit authority. To the contrary, petitioner acknowledges that this is a case of first impression. See Pet. 9. Nonetheless, petitioner argues that the case warrants immediate review in light of the similar preclusion-of-review provision of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057, 19 U.S.C. 3312(c).

To our knowledge, however, no other cases involving either that provision or 19 U.S.C. 3512(c) have been

---

[7] Brand names that are geographically misdescriptive but do not use an area of viticultural significance are not addressed by 42 C.F.R. 4.39(i).

brought. Moreover, even if such a case were brought, the unpublished decision of the court of appeals in this case would not have precedential consequences. See 9th Cir. R. 36-3; Pet. App. 1 n.1. Because the decision in this case neither creates a conflict in circuit authority nor raises an issue presently of manifest national importance, further review is not warranted. See Sup. Ct. R. 10(a) and (c).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
MICHAEL JAY SINGER
JOHN S. KOPPEL
Attorneys

SEPTEMBER 1999